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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 279

CANADIAN AVIATOR LIMITED,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

CHAUNCEY I. CLARK,
EUGENE UNDERWOOD,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Canadian Aviator Limited, prays that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Third Circuit filed May 2, 1944 affirming (with a dissenting opinion by Biggs, C. J.) a final decree in admiralty entered in the District Court for New Jersey on June 22, 1943 dismissing the libel for want of jurisdiction (R. 5).

Jurisdiction

Jurisdiction is based on Section 240(a) of the Judicial Code as amended, 28 U. S. Code 347.

The mandate of the Circuit Court of Appeals was entered May 2, 1944 (R. 22).

Opinions Below

The opinion of the District Court is not reported except at 1943 A. M. C. 744. It is printed at pages 4 to 5 of the record.

The opinion of the Circuit Court of Appeals is not reported except at 1944 A. M. C. 732. It is printed at pages 7 to 15 of the record. The dissenting opinion of Biggs, C. J., is printed at pages 15 to 22.

Summary Statement

The libel alleges that petitioner, a Canadian corporation, owned steamship *Cavelier* and that respondent owned Navy patrol boat *YP 249* which was a public vessel of the United States. While on a voyage from a Canadian to a Jamaican port the *Cavelier* was ordered by United States Naval authorities to enter Delaware Bay. As she approached the entrance she received instructions from United States Naval authorities that *YP 249* would guide her through the entrance and to follow directly astern of *YP 249*. While following directly astern of *YP 249* the *Cavelier* struck a submerged wreck and sustained serious damage due to the fault and negligence of *YP 249*. Peti-

tioner elected to have the suit proceed in accordance with the principles of libels *in rem* as well as *in personam* R. 1-3).

The narrative of events and the allegations of fault are pleaded in the libel as follows:

"Third: On July 7, 1942 the *Cavelier*, laden with cargo, was bound on a voyage from a Canadian port to a Jamaican port. Her route was fixed by orders from the United States Naval authorities, and upon orders from United States Naval authorities the *Cavelier* approached the entrance to Delaware Bay for the purpose, in obedience to such orders, of entering Delaware Bay. When the *Cavelier* reached a point in the vicinity of the entrance to Delaware Bay she received instructions from the United States Naval authorities that *YP 249* would precede the *Cavelier* through the waters of the entrance to Delaware Bay, and received orders from such authorities to follow directly astern of the *YP 249* in her transit of the waters constituting the entrance to Delaware Bay. Pursuant to these orders the *Cavelier* proceeded directly astern of the *YP 249* and attempted as ordered to enter Delaware Bay following directly astern of the *YP 249* but about 9:30 p.m., while proceeding directly astern of *YP 249* as ordered, the *Cavelier* struck a submerged wreck and sustained serious damage.

"Fourth: The aforesaid striking of the submerged wreck by the *Cavelier* and the damages resulting therefrom were not caused or contributed to by any fault or neglect on the part of the *Cavelier* or those in charge of her, the libellant herein, or anyone for whom the libellant may be responsible, but were due solely to the fault and negligence of the United States vessel *YP 249* and those in charge of her in the following respects among others:

1. She was not in charge of a competent person.

2. She failed to keep a good look-out.

3. She failed to guide the *Cavelier* safely through the waters constituting the entrance to Delaware Bay.

4. She led the *Cavelier* directly over a submerged wreck.

5. She failed to give the *Cavelier* proper or adequate guidance as to making a safe entrance into Delaware Bay."

Respondent appeared specially and excepted to the libel on the following grounds (R. 3-4):

"1. The libel fails to state a cause of action for which the United States has consented to be sued.

"2. The libel fails to state a cause of action within the provisions of the Public Vessels Act, 1925, or the Suits in Admiralty Act, 1920."

The Public Vessels Act, March 3, 1925, 43 Stat. 1112, Title 46 U. S. Code §§ 781-790, authorizes suit against the United States "for damages caused by a public vessel of the United States". Section 1 of the Public Vessels Act reads:

"A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided*, That the cause of action arose after the 6th day of April, 1920."

The District Court, ignoring the *in rem* allegations of the libel against *YP 249*, concluded that the *Cavelier* sustained her damage because of the negligence of the personnel on board *YP 249* rather than the vessel herself and held that the United States has not consented to be sued for the negligence of the officers of its naval vessels (R. 4-5).

The majority of the Circuit Court of Appeals fell into the same error and reached the same conclusion. However, Biggs, C. J., understood that the allegations of the libel were properly allegations of fault against *YP 249* herself, *in rem*, and concluded that the *Cavelier's* damage was "caused by" *YP 249* and that the Public Vessels Act authorizes suit against the United States in the circumstances alleged in the libel (R. 15-22).

Question Presented

Does the Public Vessels Act, Title 46 U. S. Code §§ 781-790, authorize suit against the United States to recover for damages sustained by a privately owned vessel where a public (Navy) vessel of the United States leads such privately owned vessel, in convoy, into collision with a submerged wreck?

Reasons for Granting the Writ

1. The decision below is in conflict with earlier decisions in the First, Second and Third Circuits in the following cases: *New England Maritime Co.* v. *United States*, 55 F. (2d) 674, (D. C. Mass.), aff'd on opinion below, 73 F. (2d) 1016, C. C. A. 1; *Coastwise Transportation Corporation* v. *United States*, 43 F. (2d) 401, (D. C. Maine); *Porello* v. *United States*, 53 F. Supp. 569, (S. D. N. Y.); *McCormick Sand & Gravel Corporation* v. *United States* (not officially reported), 1938 A. M. 1569 (E. D. N. Y.), and *The Harding Highway*, 53 F. (2d) 938, C. C. A. 3.

2. The decision below unduly restricts the class of cases in which suit against the United States is authorized by the Public Vessels Act, contrary to the plain and expressed intention of the Congress.

3. The scope of the Public Vessels Act has never been passed upon by this Court and in view of the tremendous expansion of our Navy and the large number of non-collision cases where liability of the United States is asserted under the Public Vessels Act, it is important that this Court determine the scope of the Act for the guidance of the inferior courts.

Wherefore petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Third Circuit commanding that Court to certify and to send to this Court for its review and determination on a day certain to be named therein a full and complete transcript of the record and of the proceedings in the case numbered and entitled on its dockets "No. 8429, October Term, 1943, Canadian Aviator Limited, Appellant, against United States of America, Appellee," and that the decision of the said Circuit Court of Appeals in said case be reversed and the jurisdiction sustained and that your petitioner have such other and further relief in the premises as may be just.

CANADIAN AVIATOR LIMITED,
By CHAUNCEY I. CLARK,
EUGENE UNDERWOOD,
Counsel.

Certificate

We hereby certify that we have examined the foregoing petition, that in our opinion it is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

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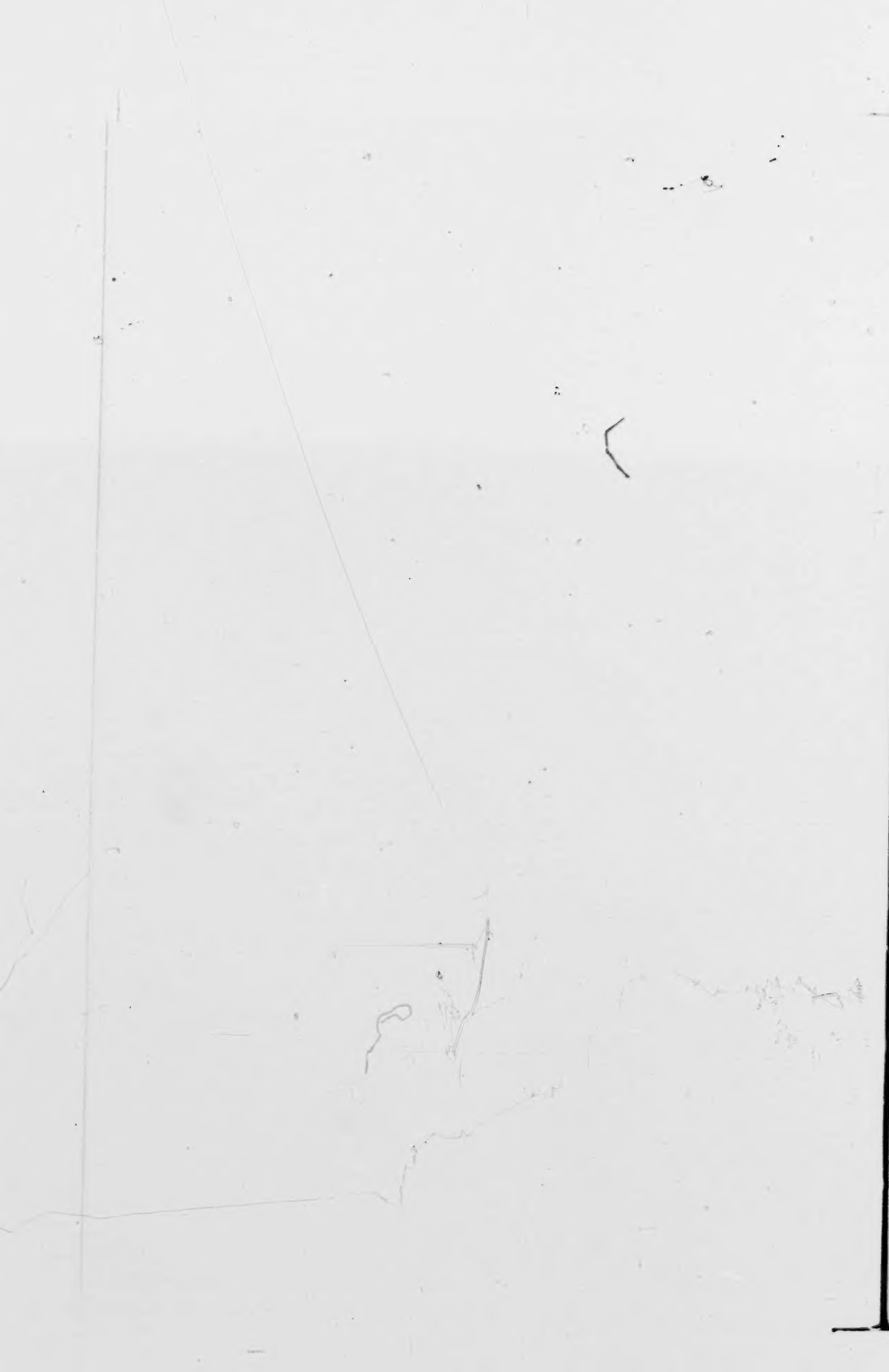
July 20, 1944.



SUPREME COURT OF THE UNITED STATES

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No.

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BRIEF IN SUPPORT OF PETITION

FIRST POINT

The decision below is in conflict with earlier decisions in the First, Second and Third Circuits.

While the majority below gave lip service to the proposition that the Public Vessels Act is not confined to collision cases it held that jurisdiction exists only where "the [public] vessel itself was the physical instrument by which the damage was done" (R. 11). This construction of the Act limits it to collision cases, in conflict with five prior decisions which the majority dismissed in a footnote (R. 10-11), or did not mention.

In *New England Maritime Co.* v. *United States*, 55 F. (2d) 674, D. C. Mass. affirmed on the opinion below, 73 F. (2d) 1016 (C. C. A. 1) suits were brought under the Public Vessels Act for the deaths of three members of the crew of the schooner *Mills* sunk in collision with the destroyer *Childs*. The three decedents survived the collision, i.e. they were not crushed or even touched by the destroyer. However, they were drowned in their ineffectual attempts to escape from the schooner before she sank. The destroyer was not the physical instrument of death. The District Court, affirmed by the Circuit Court of Appeals, held that the deaths were "caused by" the destroyer and allowed recovery. The District Court said:

> "I think the libellants in these death cases are correct in saying that a broad construction should be placed upon this Act, that it was obviously the purpose of the Act to waive the sovereign's immunity with respect to accidents on the high seas caused by public vessels, and thereby relieve Congress of the multiplicity of special acts necessary to compensate persons who had suffered damages either to their person or property. The statute is remedial, and, under well-settled practice of statutory construction, should be liberally construed" (p. 685).
>
> "In the instant case, after examining the proofs, and the cases brought before me, I am constrained to hold in these death cases that those who unfortunately lost their lives in this tragedy by drowning, are shown by the testimony to have been placed in a position of peril by the fault of the destroyer Childs. They lost their lives in an attempt to get to a place of safety. I find that the loss of their lives was nevertheless a **proximate result of** the fault of the defendant" (p. 687).

Coastwise Transportation Corporation v. *United States*, 43 F. (2d) 401 (D. C. Me.), involved a situation strikingly

similar to that at bar, the only difference being that the public vessel there was secured to the private vessel by a towline. There a Navy tug undertook to bring the merchant vessel into port and while doing so led her across shoal water so that she stranded and sustained damage. Here *YP 249* undertook to lead the *Cavelier* through the entrance to Delaware Bay and while so doing led her across a wreck so that she stranded and sustained damage. There jurisdiction under the Public Vessels Act was upheld.

In *Porello* v. *United States*, 53 F. Supp. 569 (S. D. N. Y.), respondent made the same argument it made below but the Court considered it untenable, saying:

> "The argument is that the words 'damages caused by a public vessel' refer to damage done physically by the vessel itself, as in the case of a collision, and not to damages for personal injuries caused by the negligence of employees. I do not think that this argument is tenable; * * *" (p. 569).

In *McCormick Sand & Gravel Corporation* v. *United States* (not officially reported), 1938 A. M. C. 1569 (E. D. N. Y.), the destroyer *Dahlgren*, proceeding at excessive speed, caused high waves which caused the tow of tug *Dauntless* to pound and sustain damage. Suit was brought against the United States to recover for the damage so sustained. There was no contact between the public and the private vessels. The Court held that the Public Vessels Act authorized suit in such circumstances.

In *The Harding Highway*, 53 F. (2d) 938 (C. C. A. 3), a government dredge, attempting to pass a privately owned ferryboat in the Christiana River, crowded the ferryboat so that the latter struck a stone jetty and sustained damage. There was no contact between the public and the

private vessel. Suit was brought under the Public Vessels Act * and the Circuit Court of Appeals held that the damage was "caused by" the public vessel and decreed a recovery against the United States.

See also *The Zeller No. 8*, 45 F. Supp. 359 (E. D. N. Y.), and *Haug v. United States*, 5 F. Supp. 418 (W. D. Wash.).

Biggs, C J., dissenting, fully appreciated the majority's brushing aside of the earlier decisions saying:

> "The majority opinion lays too great an emphasis upon the necessity of physical contact, such as that which ordinarily occurs in a collision, between the offending vessel and the injured vessel. This is demonstrated by the fact that the majority conceive of those decisions in which it has been held that a ship is entitled to damages for injuries sustained because she has run upon a jetty to avoid collision with another vessel or injuries have resulted to her because of swells caused by an offending vessel as an extension of waiver of immunity by the United States. See The Harding Highway, 53 F. (2d) 938; Coastwise Transp. Corp. v. The United States, 43 F. (2d) 401" (R. 15).

> "The accident occurred because the YP 249 led the Cavelier over the submerged wreck. True the submerged wreck caused the damage, but the instrument was the YP 249 which 'pulled' the Cavelier into the dangerous obstacle. Compare these facts with those of Coastwise Transp. Corporation v. United States, supra. The majority state that the YP 249 * * * * as a physical instrumentality, had no part in the matter.' This seems to me to be clearly an incorrect conclusion on the facts. The Cavelier followed the stern of the YP boat; the YP boat therefore was a physical instru-

* While it does not appear from the reported opinion that this was a suit under the Public Vessels Act we have examined the record on appeal to the Circuit Court of Appeals for the Third Circuit and find that the libel so alleges and that the answer of the United States admits the allegation of the libel that the dredge was a public vessel of the United States.

> mentality just as is the lantern which leads one down a path at night. Compare the tortious use of the dredge in The Harding Highway" (R. 21-22).

If, in *Coastwise Transportation Corporation* v. *United States*, supra, *McCormick Sand & Gravel Corporation* v. *United States*, supra, and *The Harding Highway*, supra, the public vessel was the physical cause of the damage to the private vessel although there was no contact, then *YP 249* was the physical cause of the damage sustained by the *Cavelier*.

The majority opinion below relied upon *The Osceola*, 189 U. S. 158, and *The Vera Cruz* (No. 2), 9 L. R. Prob. Div. 96 (1884). Both cases, however, interpreted a statute conferring jurisdiction of claims for damage "done by" a vessel, language much narrower than the words "caused by" used in the Public Vessels Act. Biggs, C. J., dissenting said:

> "I think these [the majority's] views are not assisted by the authority of The Osceola and The Vera Cruz (No. 2), supra. The provisions of Section 1 of the Public Vessels Act are broader than those of the Wisconsin Statute, R. S. 1898, Section 3348, which was before the Supreme Court in The Osceola, as they are likewise broader than those of the English Admiralty Court Act of 1861 which was sub judice in The Vera Cruz" (R. 17).

The majority opinion also relied upon *O'Neal* v. *United States*, 11 F. (2d) 869 (E. D. N. Y.), aff'd *per curiam* 11 F. (2d) 871 (C. C. A. 2), and *Dobson* v. *United States*, 27 F. (2d) 807 (C. C. A. 2) (R. 13). These cases have no bearing whatever on the point. The *O'Neal* case involved personal injuries sustained when a shell exploded without negligence on board a public vessel. The vessel was inert

and the injuries were neither done by nor caused by the vessel.

The *Dobson* case involved claims for the death of naval officers resulting from a collision on the high seas. The Court held that the Public Vessels Act did not create a right to recover for the death of a naval officer although "caused by" a public vessel, not because the language of the Act was not broad enough, but because of other statutory provision made by Congress to recompense such claims which the Court was not willing to infer that Congress had intended to repeal. If the majority opinion below in the case at bar construed the *Dobson* case as authority for the proposition that the Public Vessels Act does not authorize suit for deaths "caused by" collision, then the *Dobson* case and the Third Circuit are in conflict with the law in the First Circuit. See *New England Maritime Co. v. United States, supra*, 55 F. (2d) 674, D. C. Mass., aff'd on the opinion below, 73 F. (2d) 1016 (C. C. A. 1), where the Public Vessels Act was held to authorize suit against the United States for deaths "caused by" a public vessel.

SECOND POINT

The decision below is contrary to the purpose of the act as disclosed by its legislative history.

Congress did not intend to limit the waiver of sovereign immunity to collision cases. The bill which became the Public Vessels Act was H. R. 9535, 68th Congress. Its title is:

> "An Act authorizing suits against the United States in admiralty *for damage caused by* and salvage serv-

> ices rendered to public vessels belonging to the United States, and for other purposes" (43 Stat. 1112; italics ours).

Earlier in the same Congress a bill had been introduced to authorize suits in public vessel *collision* cases—H. R. 6989. Its title was:

> "A bill authorizing suits against the United States in admiralty *for collisions* caused by and salvage services rendered to public vessels belonging to the United States, and for other purposes" (italics ours).

The bill with the broader title, i.e. not limited to collision cases but extending to all cases of "damage caused by" public vessels, was enacted by Congress. The Committees on Claims of both Senate and House stated at the outset of their reports on the later bill (which was enacted) "H. R. 9535 is a substitute for H. R. 6989." See Senate Report No. 941, 68th Congress, 2nd Session; House Report No. 913, 68th Congress, 1st Session.

The title of the statute may be resorted to for clarification. *Bengzon* v. *Secretary of Justice*, 299 U. S. 410, 416.

The debates show that there was no purpose to limit the Public Vessels Act to collision cases. Mr. Underhill, who introduced the Act in the House, told the House that it allowed suit in admiralty by owners of vessels whose property had been damaged "by collision *or other fault* of Government vessels and Government agents" (see Appendix A, infra p. 27; italics ours).

Senator Bayard, who sponsored the Act in the Senate, said that it authorized suit for "damage from maritime accidents in which United States vessels are concerned * * * an accident by reason of the shortcomings of a United States ship" (see Appendix A, infra p. 27).

There is nothing in the remarks of any member of the House or Senate to indicate that the intention was to limit the Act to collision cases.

The Court below referred to the portions of the Committees' reports where it was said:

> "The *chief* purpose of this bill is to grant private owners of vessels and of merchandise a right of action when their vessels or goods have been damaged as a result of a collision * * *" (R. 8-9; italics ours).

Doubtless collision claims outnumber all other types combined. However, neither Committee reported that the purpose of the Act was to afford relief in collision cases only. Both Committees said that the *chief* purpose was to grant relief in collision cases. The word is "chief", not "only". The very presence of the word "chief" establishes that the Act was not limited to collision cases.

If either Committee had intended to limit the Act to collision cases they would have reported H. R. 6989, which was so limited by its terms, rather than H. R. 9535, which became the Public Vessels Act.

That the reports of the Executive Departments included in the Committees' reports referred to cases of collision is no criterion of the scope of the Act because each such report was with reference to the prior bill, H. R. 6989, which was by its terms limited to collision cases. The majority opinion below asserts that

> "The fact that the Congressional committees appended the correspondence regarding H. R. 6989 to their reports on H. R. 9535 is strong evidence that they did not consider that the latter bill was substantially broader than the former one" (R. 11).

If by this the majority opinion means that Congress did not understand that it had broadened the waiver of sovereign immunity beyond collision cases by substituting H. R. 9535 for H. R. 6989 the decision below is clearly erroneous. See the comments of Senator Bayard and Mr. Underhill, supra, p. 45. The majority opinion goes on to say:

> "Certainly if Congress had contemplated that H. R. 9535 would permit suit against the United States for all damages resulting from the negligence of naval personnel aboard public vessels it would not have used this correspondence as it did, but would have submitted the new bill to the department heads for their views upon the desirability of such a radical departure from historic sovereign immunity" (R. 11).

We are disposed to agree with this surmise and do not contend that the Act permits suit "for all damages resulting from the negligence of naval personnel aboard public vessels". We are content with the plain language of the Act, "damages caused by a public vessel". However, the language last quoted casts light upon the reasons for the decision. The Court apparently thought that to sustain the jurisdiction here would be to hold that the Act authorizes suit "for all damages resulting from the negligence of naval personnel aboard public vessels". There is, of course, no such contention, nor has there been. We shall point out below in our Third Point that the libel here alleges a valid cause of action *in rem* against *YP 249*, i.e. "for damages caused by a public vessel of the United States".

Biggs, C. J., dissenting below, said:

> "The legislative history of the Public Vessels Act in my opinion does not support the majority view. The original bill, H. R. 6989, dealt specifically with 'collisions'. Naturally the correspondence from executive

officers of the government and others used the words 'collision' or 'collisions' in discussing the proposed measure. Referred to the Committee on Claims of the United States Senate, H. R. 6989 died. H. R. 9535 was then introduced, containing the broad language of the Act *sub judice*. Senator Bayard stated that this bill was designed to take care of 'all' claims 'caused by reason of the shortcomings of a United States ship'. See note 2 *infra*.

The Public Vessels Act like the Merchant Vessels Act was designed to lift from the shoulders of Congress the many and harassing claims arising out of the negligent operation of ships owned or operated by the United States and to substitute therefor actions in the District Courts of the United States subject to the conditions stated. Negligent operation of United States vessels may cause damage to ships in other ways than those indicated by the majority as being within the purview of the Act. Recovery by the injured ship was not limited by Congress to such a narrow scope" (R. 18-19).

THIRD POINT

The libel states a cause of action *in rem* within the jurisdiction conferred by the Public Vessels Act.

The Public Vessels Act plainly confers jurisdiction of claims *in rem*. Section 1 authorizes suit for damage "caused by a public vessel of the United States". The vessel is personified and spoken of as the offending thing.

In Section 2 the vessel is again personified. It provides that the

> "suit shall be brought in the District Court of the United States for the District in which *the vessel* or cargo *charged with creating the liability* is found" (italics ours).

Plainly this language contemplates liability *in rem*. It is the "vessel" that is referred to as the offender.

In his letter of recommendation to the Committee on Claims Mr. Chief Justice Stone, then Attorney General, declared his understanding that the bill contemplated liability *in rem*. He said—pp. 11-12 of Senate Report No. 941, 68th Congress, Second Session:

> "Suggestions which have come to my notice favoring the bill included the view that the practice of admiralty and international law and procedure place such torts separate and apart from ordinary torts committed on land as the vessel is defined the offender rather than the owner of the vessel.
>
> I do not understand from the proposed bill whether the relief to be granted shall be determined upon principles of *in rem* liability solely or whether it shall be determined both *in rem* and *in personam* liability."

Patently the then Attorney General understood that the Act contemplated *in rem* liability. The only question in his mind was whether the Act contemplated *in personam* liability in addition to *in rem* liability.

Furthermore, the Public Vessels Act expressly incorporates the provisions of the Suits in Admiralty Act, March 9, 1920, c. 95; 41 Stat. 521; 46 U. S. Code, § 744, et seq. Section 2 of the Public Vessels Act provides:

> "* * * Such suits shall be subject to and proceed in accordance with the provisions of Chapter 20 or any amendment thereof, in so far as the same are not inconsistent herewith, except that no interest shall be allowed."

Chapter 20 referred to is the Suits in Admiralty Act, Section 3, which provides in part:

> "Such suits shall proceed and be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties * * *. If the libellant so elects in his libel, suit may proceed in accordance with the prin-

> ciples of libels *in rem* wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel *in rem* might have been maintained. Election so to proceed shall not preclude the libellant in any proper case from seeking relief *in personam* in the same suit. * * *" (46 U. S. Code, § 743).

By the two Acts, the Suits in Admiralty Act and the Public Vessels Act, Congress has plainly attempted to create an integrated system to afford redress to those who sustain damages caused by the merchant and public vessels of the United States. The two Acts are in *pari materia* and must be construed as part of the same legislative scheme. *State of Maine* v. *U. S.*, 45 F. Supp. 35, aff'd 134 F. (2d) 574 (C. C. A. 1), certiorari denied, 319 U. S. 772.

Mr. Chief Justice Stone, then Attorney General, understood that the Act was co-extensive with the Suits in Admiralty Act. In his letter to the Committee on Claims, Senate Committee Report No. 941, 68th Congress, page 11, he said:

> "The proposed bill intends to give the same relief against the Government * * * as is now given against the United States in the operation of its merchant vessels, as provided by the Suits in Admiralty Act * * *."

In his dissent below, Biggs, C. J., said:

> "While suits authorized by the Acts must be brought against the United States by libels *in personam*, Congress intended to embrace within the scope of the Acts the kind of suits which could have been maintained by a libel *in rem* against a privately owned vessel as well as the kind of suits which could have been maintained by a libel *in personam* against the private owner of the ship because of the acts of his officers or crew. Section 2 of Merchants Vessels Act provides this specifically and both acts require substantially similar construction" (R. 16).

It is an ancient and firmly established principle of the admiralty (and it was to the admiralty, not the common law, court that Congress gave jurisdiction under the Public Vessels Act) that the vessel herself is a juristic person and that her acts and omissions, although actuated by her personnel, are personal acts of hers, for which she, as a juristic person, *in rem*, is legally responsible. *The Brig Malek Adhel*, 2 How. 210, 233, 234; *The China*, 7 Wall. 53, 68-9; *The Barnstable*, 181 U. S. 464, 467; *Ralli* v. *Troop*, 157 U. S. 386, 402-3; *The John G. Stevens*, 170 U. S. 113, 120.

The majority opinion below brushed aside the patent *in rem* liability contemplated by Congress on the ground that "the personalization of a ship has no significance in the absence of an enforceable maritime lien" (R. 14) and, since Section 8 of the Public Vessels Act expressly provides that no lien shall be created, Congress cannot have contemplated liability *in rem* (R. 14). Plainly the Court erred in this view because, if the existence of an enforceable maritime lien is essential, the Act does not authorize suit even in collision cases because the prohibition against liens contained in Section 8 is of universal application.

Congress *expressly* provided for liability *in rem* in the Suits in Admiralty Act and *expressly* incorporated the Suits in Admiralty Act in the Public Vessels Act. Why, unless it contemplated suits *in rem* under the Public Vessels Act as well as under the Suits in Admiralty Act? Furthermore, the absence of an enforceable lien is no bar to a proceeding against the sovereign on principles of *in rem* liability if the sovereign wishes to permit suit in that fashion. Since this Court's decision in *Clyde Mallory Lines* v. *United States*, 317 U. S. 395, it seems clear that

there is no enforceable lien against even a merchant vessel of the United States, yet no one denies that the sovereign has consented to be sued on principles of *in rem* liability in respect of its merchant vessels.

The majority opinion below, overlooking the plain allegations of *in rem* liability in the libel, chose to construe the allegations as in reality against the crew of *YP 249*, saying:

> "Libellant's complaint in reality* is of the negligence of the navigating officers of the YP 249 whose directions the Cavelier was following" (R. 15).

Biggs, C. J., dissenting, plainly saw the error of this view. He said:

> "If I am correct in my conclusion that it was the intention of Congress to impose on the United States the same liability (libel *in rem* aside) as is imposed by the Admiralty law on the private shipowner, the authorities which would support a judgment in favor of the libellant are legion. See The Kronprinzessin Cecile, 192 Fed. 27; The Compania, 203 Fed. 855; The Washington Irving, 250 Fed. 797; The Luke, 19 F. (2nd) 923, aff'd 19 F. (2nd) 925; The J. C. Hart, 43 F. (2nd) 566; The Favorita, 43 F. (2nd) 569. See also The Lyndhurst, 92 Fed. 681, in which a tug at night turned her tow adrift without proper lights. Her tow came into collision with another tug. The first tug was held to be at fault *in rem* for leaving her tow without lights. This is the equivalent of saying that she was at fault *in rem* because those in charge of her failed to light the tow" (R. 21).
>
> "The accident occurred because the YP 249 led the Cavelier over the submerged wreck. True the submerged wreck caused the damage, but the instrument was the YP 249 which 'pulled' the Cavelier into the dangerous obstacle. Compare these facts with those of Coastwise Transp. Corporation v. United States,

* In other words, the majority refused to accept the allegations of the libel as made.

supra. The majority state that the YP 249 ' . . . as a physical instrumentality, had no part in the matter.' This seems to me to be clearly an incorrect conclusion on the facts. The Cavelier followed the stern of the YP boat; the YP boat therefore was a physical instrumentality just as is the lantern which leads one down a path at night. Compare the tortious use of the dredge in The Harding Highway" (R. 21-22).

Plainly Biggs, C. J., was right. The first specification of fault in the libel is that *YP 249* "was not in charge of a competent person". It is well settled that *in rem* liability exists if the charge be proved. *The Teaser*, 229 Fed. 476 (E. D. Pa.); *The Prudence*, 190 Fed. 671 (E. D. Va.).

The second specification of fault in the libel is that "she failed to keep a good lookout". Here again *in rem* liability is clear if the charge be proved. *St. John* v. *Paine*, 10 How. 557, 585; *Newton* v. *Stebbins*, 10 How. 586, 607; *The Genesee Chief*, 12 How. 443, 463.

The third, fourth and fifth specifications of fault in the libel are that *YP 249* "failed to guide the *Cavelier* * * * She led the *Cavelier* * * * She failed to give the *Cavelier* proper or adequate guidance * * *". These are allegations that the vessel, a thing, a *res*, a legal entity, not her personnel, failed in her duty and clearly charge liability *in rem*. Compare *Coastwise Transportation Corp.* v. *U. S.*, *supra*, 43 F. (2d) 401.

FOURTH POINT

The libel states a cause of action *in personam* within the jurisdiction conferred by the Public Vessels Act.

The majority opinion below concluded that petitioner's complaint "in reality is of the negligence of the navigating

officers of the YP 249 * * *" (R. 15). Admittedly, therefore, the libel alleges a cause of action *in personam*. The Act authorizes suit on that theory as well as *in rem*. Section 2 of the Act, 46 U. S. Code, § 782, provides that suits therein authorized "shall be subject to and proceed in accordance with" the Suits in Admiralty Act. Section 3 of the Suits in Admiralty Act, 46 U. S. Code, § 743, provides that the libellant may elect to proceed as *in rem* but that "election so to proceed shall not preclude the libellant in any proper case from seeking relief *in personam* in the same suit".

Since the Suits in Admiralty Act is expressly incorporated in the Public Vessels Act the latter likewise authorizes suit *in personam*. In his report to the Committee on Claims concerning the Public Vessels Act when it was pending in Congress Mr. Chief Justice Stone, then Attorney General, said:

> "The proposed bill intends to give the same relief against the Government * * * as is now given against the United States in the operation of its merchant vessels, as provided by the Suits in Admiralty Act * * *" (Senate Committee Report No. 941, 67th Congress, page 11).

In *Benedict on Admiralty*, 6th Edition, Volume I, the author, referring both to the Public Vessels Act and the Suits in Admiralty Act, says:

> "The Acts authorize suit where, if the government vessel were privately owned or operated or the cargo privately owned or possessed, 'a proceeding in admiralty could be maintained at the time of the commencement of the action' provided for in the Acts. The Acts do not say 'where a libel *in rem* could be maintained' but read 'a proceeding in admiralty', a

> generic term embracing in its natural connotation actions *in rem* and actions *in personam* both of which were separately specified in the original draft for which the final form has substituted a single but inclusive phrase. Equally clear is the implication of the provision that election to proceed upon the principles of libels *in rem* shall not preclude the libellant in any proper case from seeking relief *in personam* in the same suit" (Sec. 195, pp. 457-458).

This Court has expressly held that the Suits in Admiralty Act authorizes suit on a cause of action *in personam*. In *Eastern Transportation Co.* v. *United States*, 272 U. S. 675, there was no possibility of *in rem* liability on the part of the United States because the government-owned vessel had been sunk and was a total loss. There was no longer a *res*. Suit was brought on the theory of liability *in personam*, the question of jurisdiction was squarely raised, and this Court held that suit on the theory of *in personam* liability was authorized.

Therefore, even if petitioner has no claim *in rem* and if, as the majority opinion below held, petitioner's complaint "in reality is of the negligence of the navigating officers of the YP 249" the libel should not have been dismissed because it states a cause of action *in personam*. Petitioner elected to proceed both *in personam* and *in rem*. Article sixth of the libel reads:

> "Libellant elects to have this suit proceed in accordance with the principles of libels *in personam* and *in rem*" (R. 3).

LAST POINT

The question raised is of general importance.

The question here raised will arise again and again. Our fleet of "public" vessels has increased enormously, consisting of vessels operated by the Navy, Army, Coast Guard and other services. With every convoy go Naval escort vessels. The entrance to every important harbor is controlled by Naval vessels. The number of cases where Naval vessels compel the manouevres of privately owned vessels is, we believe, large. The number of cases where *in personam* liability is also claimed, because of directions given or withheld by Naval personnel is, we believe, likewise large. Many other cases are likely to be brought raising this and closely related questions. In view of the strong dissent below and the other points made above, it is respectfully submitted that the writ of certiorari prayed for should be granted, that the decisions below be reversed and the jurisdiction sustained, with costs.

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EUGENE UNDERWOOD,
Counsel for Petitioner.

New York, N. Y., July 20, 1944.

APPENDIX A

Mr. Underhill's Remarks

"The bill I have introduced simply allows suits in admiralty to be brought by owners of vessels whose property has been damaged by collision *or other* fault of Government vessels and Government agents." Congressional Record, 68th Congress, 2nd Session, January 19, 1925, p. 2087 (italics ours).

Senator Bayard's Remarks

"Mr. President, the Senator from Arkansas is quite right; it is a measure of great importance. There are continuous applications being made to the Claims Committee of both Houses for the consideration of bills to reimburse people who have suffered *damage from maritime accidents in which United States vessels are concerned*, to enable them to present their suits in the various district courts. In this last Congress there were nearly 200 such claim bills introduced in the two Houses.

Outside of that, there are many claims which must be settled by the Department of State, because our own nationals are forbidden going into our own Courts, and the nationals of other countries cannot come in, and this bill is to remedy that situation. It would give a person aggrieved because of *an accident by reason of the shortcomings of a United States ship* the right to go into a district court and prosecute his action." Congressional Record, 68th Congress, 2nd Session, February 12, 1925, p. 3560 (italics ours).